



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4122625/2018

5

Held in Edinburgh on 18 March 2019

Employment Judge: Mel Sangster

10

Mr J Glendinning

**Claimant
In Person**

15

Mitsubishi Electric Air Conditioning Systems Europe Ltd

**Respondent
Represented by:
Ms L Miller
Solicitor**

20

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claim of unfair dismissal does not succeed and is dismissed.

REASONS

Introduction

25

1. The claimant presented a complaint of unfair dismissal. The respondent admitted the claimant was dismissed, but stated that the reason for dismissal was gross misconduct, which is a potentially fair reason. The respondent maintained that they acted fairly and reasonably in treating misconduct as sufficient reason for dismissal and had acted within the band of reasonable responses.

30

2. The respondent led evidence from Grant Lesslie (**GL**) Production Supervisor, Alan Lugton (**AL**) Senior Production Supervisor, Andrew McDonald (**AM**) Production Section Manager, Rodney Ayre (**RA**) Senior Department Manager and Ian Riddle (**IR**) Senior Department Manager, Administration. The claimant gave evidence on his own behalf. A joint set of productions was lodged.

35

Issues to be determined

3. Was the reason for the claimant's dismissal a potentially fair reason, within the meaning of s98(1) or (2) of the Employment Rights Act 1996 (the **ERA**)?
4. Was the claimant's dismissal for that reason fair in all the circumstances, in terms of s98(4) ERA?
- 5
5. If the dismissal was unfair, should the claimant be reinstated?
6. Failing which, what, if any, compensation should be awarded taking into account:
 - 10 a. whether, if procedurally unfair, the claimant would have been dismissed in any event (*Polkey v AE Dayton Services Limited [1987] 3 All ER 974*); and
 - b. whether, by his conduct, the claimant had contributed to his dismissal.

Findings in Fact

7. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.
- 15
8. The respondent manufactures electric air conditioning systems. The claimant was employed by the respondent as a Process Co-ordinator. He worked on night shift. His employment commenced in May 2014.
9. On 25 January 2018, the claimant was issued with a final written warning in relation to his conduct. Specifically, it was determined that he had discussed and provided misleading information. The letter confirming the final written warning stated *'This warning will be placed on your personnel file for a period of 52 working weeks and provided there is no other issues related to your conduct will be disregarded for disciplinary reasons after this period'*.
- 20
10. On 7 June 2018, the claimant was advised that an investigation would be conducted in relation to his conduct on the night shift which had commenced at 11pm the previous day. It was alleged that the claimant had been shouting at and aggressive towards a colleague.
- 25

11. The following steps were taken to investigate the allegation

5 a. Alan Orr (**AO**), Line Leader, was interviewed by GL. He indicated that around ten minutes prior to the first break (which began at 12.30am) the claimant had asked to go to the toilet. This was authorised. AO stated that after the break he asked the claimant if he had returned prior to the break. He stated that the claimant became very defensive at that question, but that he did not make a big deal of it, he just wanted to know. AO later noticed that very few of the parts which the claimant was working on were complete – around 20, when he would have expected around 90 to have been completed by that point. AO stated that asked the claimant about this and he became angry, aggressive and started swearing. AO stated that this went on for around 5 minutes, with the claimant stating *'you and Kevin Gibney won't be fckng happy until I am sacked.'* He stated that the claimant then picked up the aluminium rectangle block to put it back on, it broke off in his hand and he chucked it into the machine in a rage. AO then told his supervisor, KG about this. AO stated that he was surprised by the claimant's reaction and that he felt this was a build up of anger after asking him about the toilet break and then questioning his numbers. He stated that the claimant calmed down quickly after that and was friendly towards him again, as if nothing had happened.

25 b. Alex Ling, Production Operator was interviewed by GL. He stated that after he came back from his break he noticed the claimant pointing and shouting at AO. He stated that he couldn't hear precisely what was being said as it was loud in the factory. He went to get KG, the supervisor, but KG indicated that AO would be able to handle the situation. He stated that, as he returned he saw the claimant chuck a cap and heard the smash from it.

30 c. KG, Production Supervisor was interviewed by GL. He stated that he was approached by AL who informed him that the claimant was shouting and swearing at AO. He stated that AO would be able to handle the situation and, if AO required assistance, he could come and get him. He

then stated that AL told him that the claimant had chucked something. He stated that he then got up and went towards where the claimant was working. He met AO on route, who was coming to speak to him. KG stated that AO told him that the claimant had been arrogant and aggressive and was shouting and swearing and chucked something in a temper. KG stated that he sought advice from AM as to how to proceed and then took the claimant into a room, with another person present, to inform him that there would be an investigation into his behaviour.

d. The claimant was interviewed by AL on 12 July 2018. He had been absent from work due to ill health from 11 June to 6 July 2018. The claimant stated that he had been chatting to AO and an aluminium thing came off and burnt his glove. He stated that he reacted with a swear word, flipped it and it went into the machine. He stated that he didn't do so in anger and that there was no altercation between him and AO. He stated that things were fine between him and AO and at the end of the shift he was talking to AO about the potential of him doing overtime.

12. Notes of these discussions were prepared and passed to AM for consideration. He considered matters and decided that the allegation should be considered in a disciplinary context. He accordingly wrote to the claimant, by letter dated 17 July 2018, informing him that he required to attend a disciplinary hearing on 25 July 2018 in relation to an allegation that he had *'used inappropriate language and aggressive behaviour towards a fellow employee'*. The letter confirmed that, if the allegation was found to be accurate, then he could be dismissed as he was subject to a 'live' final written warning. A copy of the notes taken during each of the investigation meetings was enclosed with the letter.

13. The disciplinary hearing took place on 25 July 2018. AM conducted the hearing and was accompanied by Ian Auldjo, the respondent's HR manager. The claimant was accompanied by Mr Gordon. The claimant denied he had used inappropriate language and had been aggressive towards AO. At the conclusion of the disciplinary hearing AM informed the claimant that he believed AO and AL rather than the claimant. He noted that the position put forward by AO and AL, respectively, was very similar. He could see no reason why they

would lie about this matter and noted that the claimant had not put forward any explanation for why they might do so. He therefore upheld the allegation of misconduct. Taking into account the fact that the claimant had a live final written warning, AM decided to dismiss the claimant for misconduct. The claimant was informed that he would receive payment in lieu of his notice period, and was also informed of his right to appeal.

14. AM wrote to the claimant on 26 July 2018 to confirm his decision.

15. The claimant appealed against the decision by letter dated 1 August 2018. His appeal was heard by RA and IR. The appeal hearing took place on 21 August 2018. Following the appeal hearing RA reinterviewed KG, AO & AL. He concluded from this that it was clear the claimant was shouting, using inappropriate language and was aggressive towards AO. RA and IR met with the claimant on 6 September 2018. They advised him that they felt the decision taken by AM had been correct and they accepted that the version of events put forward by the supervisor and other witnesses. They did not believe the version of events put forward by the claimant. Rather, they felt that the claimant behaviour was aggressive and the language he used was inappropriate. There was therefore no reason to overturn original decision. A letter was sent to the claimant dated 18 September 2018 confirming this.

Relevant Law

16. S94 ERA provides that an employee has the right not to be unfairly dismissed.

17. In cases where the fact of dismissal is admitted, as it is in the present case, the first task of the Tribunal is to consider whether it has been satisfied by the respondent (the burden of proof being upon them in this regard) as to the reason for the dismissal and that it is a potentially fair reason falling within s98(1) or (2) ERA.

18. If the Tribunal is so satisfied, it should proceed to determine whether the dismissal was fair or unfair, applying the test within s98(4) ERA. The determination of that question (having regard to the reason shown by the employer):-

“(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking), the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

5 (b) shall be determined in accordance with equity and the substantial merits of the case.”

19. Where an employee has been dismissed for misconduct, **British Home Stores v Burchell [1978] IRLR 379**, sets out the questions to be addressed by the Tribunal when considering reasonableness as follows:

- 10 i. whether the respondent genuinely believed the individual to be guilty of misconduct;
- ii. whether the respondent had reasonable grounds for believing the individual was guilty of that misconduct; and
- 15 iii. whether, when it formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.

20. In determining whether the employer acted reasonably, it is not for the Tribunal to decide whether it would have dismissed for that reason. That would be an error of law as the Tribunal would have ‘substituted its own view’ for that of the employer. Rather, the Tribunal must consider the objective standards of a reasonable employer and bear in mind that there is a range of responses to any given situation available to a reasonable employer. It is only if, applying that objective standard, the decision to dismiss (and the procedure adopted) is found to be outside that range of reasonable responses, that the dismissal should be found to be unfair (**Iceland Frozen Foods Limited v Jones [1982] IRLR 439**).

25

Submissions

21. Ms Miller for the respondent referred to the Burchell tests and stated that these were satisfied. The respondent conducted a reasonable investigation and the respondent acted reasonably in dismissing the claimant, with notice, for misconduct. She stated that there was no evidence to support the claimant’s

30

contention that his dismissal was as a result of a vendetta on the part of KG, and a conspiracy to dismiss him as a result of this.

22. The claimant did not make a closing submission.

Discussion & Decision

5 23. The Tribunal referred to s98(1) ERA. It provides that the respondent must show the reason for the dismissal, or if more than one the principal reason, and that it was for one of the potentially fair reasons set out in s98(2). At this stage the Tribunal was not considering the question of reasonableness. The Tribunal had to consider whether the respondent had established a potentially fair reason for
10 dismissal. The Tribunal accepted that the reason for dismissal was the claimant's conduct – a potentially fair reason under s98(2)(b). No other reason has been asserted.

15 24. The Tribunal then considered s98(4) ERA. The Tribunal had to determine whether the dismissal was fair or unfair, having regard to the reason is shown by the respondent. The answer to that question depends on whether, in the circumstances (including the size and administrative resources the employer is undertaking) the respondent acted reasonably in treating the reason as a sufficient reason for dismissing the employee. This should be determined in accordance with equity and the substantial merits of the case. The Tribunal was
20 mindful of the guidance given in cases such as ***Iceland Frozen Foods Limited*** that it must not substitute its own decision, as to what the right course to adopt would have been, for that of the respondent. There is a band of reasonableness within which one employer might reasonably dismiss the employee, whereas another would quite reasonably keep the employee on. If no reasonable employer would have dismissed, then dismissal is unfair, but if a reasonable
25 employer might reasonably have dismissed, the dismissal is fair.

30 25. The Tribunal referred to the case of ***British Home Stores v Burchell***. The Tribunal was mindful that it should not consider whether the claimant had in fact committed the conduct in question, as alleged, but rather whether the respondent genuinely believed he had and whether the respondent had

reasonable grounds for that belief, having carried out a reasonable investigation.

Did AM have a genuine belief?

5 26. The Tribunal concluded that AM did have a genuine belief that the claimant had used inappropriate language and had acted aggressively towards his supervisor. His evidence was clear on this point and this was consistent with the explanation provided at the disciplinary hearing and in the letter confirming the claimant's dismissal.

Did AM have reasonable grounds for his belief?

10 27. AM was faced with two contrasting versions of events – that of AO and AL, who stated that the claimant had acted aggressively and used inappropriate language towards AO, versus that of the claimant, who denied the allegations. He required to consider which version he believed. He could see no reason why AO and AL would lie about this matter and noted that the claimant had not put
15 forward any explanation for why they might do so. He noted the similarity in the position which they both put forward and reached the conclusion that the claimant had committed the misconduct alleged.

28. The Tribunal accepted that these were the grounds for AM's belief and find that these amounted to reasonable grounds for AM to conclude that the claimant
20 had acted aggressively and used inappropriate language towards AO. This finding, and the finding that this conduct amounted to misconduct, were open to AM in the circumstances and fell within the band of reasonable responses.

29. The claimant did not assert at the disciplinary hearing, as he did during the Hearing before the Tribunal, that the allegations were fabricated as a result of
25 a vendetta which KG had against him. In effect that KG, AO and AL conspired together. This allegation was not therefore considered by AM.

30. Having reached the conclusion that the claimant committed misconduct by his actions, and taking into account the fact that he had been issued with a final written warning in relation to his conduct 6 months before, AM concluded that

the claimant should be dismissed with notice. That conclusion fell within the band of reasonable responses open to AM in the circumstances.

Was there a reasonable investigation?

- 5 31. The respondent conducted a thorough investigation. All the relevant potential witnesses were interviewed. There were no further steps which should, reasonably, have been undertaken.

Procedure

- 10 32. The respondent investigated the allegations. The claimant was invited to a disciplinary hearing and provided with the opportunity to review the evidence which the respondent had gathered in the course of the investigation, prior to the disciplinary hearing. He was given the opportunity to respond to the allegations at the disciplinary hearing and provided with the opportunity to appeal, which he exercised. The respondent followed their internal Disciplinary Procedure in doing so.
- 15 33. The Tribunal find that the procedure adopted by the respondent was fair and reasonable in the circumstances.

Conclusions re s98(4)

- 20 34. For the reasons stated above the Tribunal conclude that the respondent acted reasonably in treating the claimant's conduct as a sufficient reason for dismissal.
35. For these reasons, the claim of unfair dismissal is dismissed.

25 Employment Judge: Mel Sangster
Date of Judgement: 08 April 2019
Entered in register: 29 April 2019
And copied to parties